No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

GEORGE PETTUS,
Petitioner

v.

AMERICAN AIRLINES, INC., *ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The claimant, George Pettus, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, pp. 1a-20a) is reported at 587 F.2d 627. The opinion of the Benefits Review Board is reported at 6 BRBS 461 (App. B, *infra*, pp. 21a-27a). The decision of the Administrative Law Judge is unreported. (App. C, *infra*, pp. 28a-41a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1978. Petitioner's first petition for rehearing or rehearing en banc was denied on January 4, 1979. Petitioner's second timely petition for rehearing or rehearing en banc was denied March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

QUESTION PRESENTED

Whether a final decision of the Industrial Commission of the state of Virginia bars a subsequent claim for worker's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as it is made applicable to the District of Columbia, under the reasoning of this Court in *Industrial Commission v. McCartin*, 330 U.S. 622 (1947).

STATUTES INVOLVED

The pertinent statutes under the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia are as follows:

Section 7(d) of the Act, 86 Stat. 1251, 1254, 33 U.S.C. §907(d) (Supp. V, 1975) states:

> . . . If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

Section 501 of the District of Columbia Code, 45 Stat. 600, 36 D.C. Code §501 (1973) states:

> Section 1. Longshoremen's And Harbor Workers' Compensation Act Made Applicable To District Of Columbia
>
> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

The Virginia Workmen's Compensation Act, applicable at the time of injury is embodied in Title 65.1 of the Virginia Code.

Section 65.1-40 of the Virginia Code, Va. Code §65.1-40 states:

> §65.1-40. Employee's rights under Act exclude all others. — The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, §65-37, 1968, c. 660)

Section 65.1-88, Va. Code §65.1-88 states:

> As long as necessary after an accident the employer shall furnish or cause to be furnished * * * a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention * * * as the nature of the injury may require, and the employee shall accept the attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Industrial Commission
>
> * * * * *
>
> The refusal of the employee to accept such service when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Industrial Commission, the circumstances justified the refusal. * * *

STATEMENT

Petitioner George Pettus was injured while working for American Airlines, Inc. at Washington, D.C.'s National Airport on May 10, 1972. Prior to that date, petitioner had been employed by American Airlines for approximately three years. He initially was hired by American in the District of Columbia at the United Planning Organization subsequent to a series of interviews. At all pertinent times, petitioner was a resident of the District of Columbia.

Subsequent to his injury, petitioner's condition worsened, and back surgery was suggested in an effort to improve his situation. He declined to undergo the operation for a number of reasons, which led to a cessation of his Virginia Workmen's Compensation benefits. After an appeal to the full Industrial Commission which upheld the termination, petitioner filed a claim in the District of Columbia. He then proceeded through the administrative process to a formal hearing held before an Administrative Law Judge. Petitioner's claim was denied at that level, 2 BRBS 93 (ALJ) (1975), and an appeal was instituted to the Benefits Review Board. That body reversed the decision of the Administrative Law Judge and remanded the case for a further hearing. 3 BRBS 315 (1976).

At the second hearing before Administrative Law Judge Robert S. Amery, petitioner elaborated on his decision not to undergo surgery. He indicated that his reluctance stemmed from a fear of hospitalization generally, a feeling engendered by the death of his wife in the hospital following an accident. Petitioner further expressed a fear of anesthesia resulting from his orthopedist's concern over his asthma which presented added risk during surgery and post-operative management. Finally, he noted that the likelihood of substantial disability even after surgery was a further factor in his decision. The decision of the Administrative Law Judge in this instance was wholly favorable to petitioner, leading to an appeal by American Airlines to the Benefits Review Board. That reviewing body affirmed the decision of the Administrative Law Judge in all respects, including the findings of extra-territorial application of the District's Act as well as a rejection of the employer's theories of *res judicata*, collateral estoppel and Full Faith and Credit as bars to the District of Columbia action. Petitioner's refusal of surgery was also found to be reasonable under the circumstances enumerated above.

The employer then sought review by the Court of Appeals under Section 21(c) of the Act, 33 U.S.C. §21(c). The Court of Appeals, after oral argument, vacated the decision of the Benefits Review Board. The Court found that Va. Code

§65.1-40 made Virginia compensation the exclusive remedy as against the employer, thereby estopping the later claim in the District (App. A, *infra*, pp. 9a-10a). Additionally, the majority panel found the issue surrounding petitioner's refusal of surgery to be identical in each jurisdiction, making the final decision of the Industrial Commission to terminate benefits a bar to the District claim under the doctrine of *res judicata* (*Id.* at pp. 4a-5a). Circuit Judge Hall, however, filed a lengthy dissent in which he stated that the majority had failed to show any legislative basis or case law from the Virginia courts to support its finding that §65.1-40 was indicative of an intent to make Virginia's Act exclusive of any remedy other than a common law action against the employer (*Id.* at pp. 13a-14a). He further asserted that the reasoning of *Industrial Commission v. McCartin*, 330 U.S. 622 (1947) was applicable to the situation at bar rather than that of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) as §65.1-40 contains no "unmistakable language" which would limit petitioner's right to a subsequent award in the District (*Id.* at pp. 11a-13a). Finally, he stated that neither the doctrines of *res judicata* nor collateral estoppel could be applied. He reasoned that Virginia had neither the right nor the ability to determine petitioner's District of Columbia rights in the Virginia proceeding, thereby leaving those issues to be decided by the District tribunal. Similarly, he noted that the two statutes involving refusal of surgery differed materially in content as well as in burden of proof, with the District law being far less harsh. Thus, where petitioner's burden of persuasion was less onerous under the later District proceeding, the alleged identity of issues found by the majority vanished, leaving the doctrine of collateral estoppel inapplicable. (*Id.* at pp. 14a-17a).

In light of the dissent, as well as the conflict between the majority view and the *McCartin* case, petitioner filed two petitions for rehearing or rehearing en banc. Both were denied, and the present petition ensued.

REASONS FOR GRANTING THE WRIT

The primary basis for the petition in this matter is the clear conflict between the decision of the Court of Appeals below and the landmark case of *Industrial Commission of Wisconsin v. McCartin* 330 U.S. 622 (1947). The latter case has been the source of guidance for both state and federal courts when they are faced with the issue of the validity of successive workers' compensation awards in two states which have interests in the welfare of an injured claimant. The potential barrier to such awards, the Full Faith and Credit Clause, Art. IV, Section 1 of the Constitution of the United States,[1] was examined by the Court in light of the so-called exclusive remedy provision of the Illinois Workmen's Compensation Act, Ill. Rev. Stat., Ch. 48, §§138-172 (1943). Had that particular section commanded that an Illinois compensation award was to be final and conclusive of *all* of the employee's rights against the employer and insurer as a result of the injury, the subsequent award in Wisconsin would have been barred by the Full Faith and Credit Clause, and the Court would have followed its earlier ruling in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1944). The situation in *McCartin*, however, precluded such an outcome, as the section in question limited *only* the employee's common law rights against his employer with no reference to his right to pursue a further, and presumably more adequate compensation remedy in another jurisdiction. The essence of the *McCartin* ruling is found on page 627-8 of the decision wherein Mr. Justice Murphy states:

> But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment [citations omitted]. And in

[1] Now embodied in 28 U.S.C. §1738.

> light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted [citation omitted], we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislative or judiciary would warrant our accepting such a construction. . . .*
> 330 U.S. at 627-8 (Emphasis added)

The language of the last sentence since has become the bellwether for virtually all court cases over the past thirty years.

The additional effect of the *McCartin* decision has been to circumscribe severely the value of the *Magnolia* opinion. The unanimous *McCartin* panel made it clear that unless the statute under review has some obvious peculiarity which delimits the rights of the claimants, such as the Texas statute allegedly did in *Magnolia*,[2] a later award in another jurisdiction meets with constitutional approval.

While *Magnolia* may not have been expressly overruled, it is evident that it is not in tune with judicial or legislative trends in workers' compensation. Certainly the body of case law which has grown up over three decades has indicated a distinct, indeed, nearly unanimous preference for the more logical *McCartin* approach. *See Director, Office of Workers' Compensation Programs v. Boughman*, 179 U.S. App. D.C. 132, 545 F.2d 210 (1976); *Jordan v. Industrial Commission*, 117 Ariz. 215, 571 P.2d 712 (1977); *Stanley v. Hinchliffe and Kenner*, 395 Mich. 645, 238 N.W.2d 13

[2]Professor Larson has noted in his treaties that the Texas statute may not prevent a subsequent award in another state, so that the *Magnolia* doctrine may not even apply there in spite of the original decision. 4A *Larson, The Law of Workmen's Compensation*, §85.39 (1976). See *Griffin v. Universal Underwriters Insurance Company, supra.*

(1976); *Griffin v. Universal Underwriters Insurance Company*, 283 So.2d 748 (La. 1973), *cert. denied*, 416 U.S. 904 (1974); *Wood v. Aetna Casualty and Surety Company*, 260 Md.651, 273 A.2d 125 (1971); *Hudson v. Kingston Contracting Co.*, 58 N.J. Super. 455, 156 A.2d 491 (1959); *LaRue v. El Paso Natural Gas Co.*, 57 N.M. 93, 254 P.2d 1059 (1953). See also 4A Larson, *The Law of Workmen's Compensation*, §§85.10-60.

In spite of the *McCartin* directives as well as its progeny, the Court of Appeals in this instance has elected to follow the reasoning in *Magnolia* in interpreting the meaning of Va. Code §65.1-40, the "exclusive remedy" provision of the Virginia Workmen's Compensation Act. The net effect of the decision has been to create considerable confusion as to the status of claimants who are similarly situated[3] as well as to the weight to be accorded to *Magnolia Petroleum Co. v. Hunt, supra*, where the statute contains no "unmistakable" language limiting its application. Petitioner believes that the Court's result is at odds with the clear language of the statute, the legislative intent behind it as well as judicial interpretations of the section which demonstrate the true purpose of that portion of the law.

The wording of §65.1-40 is brief, with little excess verbiage which might lead to differing interpretations:

> "[t]he rights and remedies herein granted to an employee when he and his employer have accepted this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal

[3]Due to the unusual geographic proximity of the three jurisdictions which make up the Washington, D.C. metropolitan area, it has not been uncommon for injured workers to claim benefits in more than one jurisdiction, especially in light of the more liberal benefit structure in the District of Columbia.

> representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

The object of this section, not unlike most such statutes, is to limit the recovery of injured workers to compensation benefits without any right to pursue common law remedies against a potentially negligent employer. *Bristow v. Safeway Steel Products*, 327 F.2d 608 (4 Cir. 1964); *Slusher v. Paramount Warrior, Inc.*, 336 F.Supp. 1381 (W.D. Va. 1971); *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Although no case has been found dealing with the precise issue at hand,[4] the Virginia courts have indicated that only the right to sue one's employer for damages is barred by a worker's acceptance of Virginia compensation benefits. *Veale v. Norfolk & W. Ry.* 205 Va. 822, 139 S.E.2d 797 (1965); *Noblin v. Randolph Corp.*, 180 Va. 345, 23 S.E.2d 209 (1942).

There is further evidence, however, that the *Magnolia* rationale has no application in Virginia. In his lengthy dissent in *Magnolia*, Mr. Justice Black indicated that the decision of the five member majority was "flatly in conflict with accepted law in practice." 320 U.S. at 457. In support of this view, the dissent then reviewed a number of state statutes which specifically permit successive awards. Included among them was a Virginia statute, cited as Va. Code 1942, §1887(37), now embodied in Va. Code §65.1-61, which allows a claimant to receive Virginia benefits after receiving an award from another state. The only limitation imposed is that the amount received by the injured worker from Virginia cannot exceed the total allowed by Virginia,

[4]The majority of the panel below was unable to cite any Virginia authority to support its position. Its only citation with respect to that state's interpretation was to a Virginia Law Review article, 59 *Va. L. Rev.* 1632 (1973). That survey article deals *only* with the issue of third party litigation under this section and §65.1-30 which concerns statutory employers and their obligations.

i.e. no double recovery. While not precisely the issue addressed below, the theory behind the section is identical to that urged by petitioner. It would make little sense for Virginia to permit itself to issue a second award while refusing another state the same right. Additionally, this reference in the dissent must be examined in light of the unanimous opinion in *McCartin* which endorses the general view expressed by the statute as well as other authorities.[5]

Further confusion has been engendered by the decision below due to its conflict with opinions in other circuits as well as with a contemporaneous ruling of this same court. In the former instance, the majority's view is at distinct variance with the thinking of the District of Columbia Circuit which has wholeheartedly endorsed the principle of successive awards. That particular case, *Director, Office of Workers' Compensation Programs v. Boughman*, 179 U.S. App. D.C. 132, 545 F.2d 210 (1976), concerned itself with the extension of the District of Columbia Workers' Compensation Act to a claim which initially arose in California. On appeal, the issue of possible violation of the Full Faith and Credit Clause arose and was dealt with summarily by the Court. The panel indicated that nothing in the California "exclusive remedy" section which would lend itself to interpretation as "unmistakable language" which would limit a claimant's right to pursue a further remedy under the compensation law of another jurisdiction. In truth, the section in question therein is not at all dissimilar from the

[5]Mr. Justice Black's dissent also refers to the *Restatement of Conflict of Laws*, §403 which embodies the successive award idea. This section has been simplified in *The Restatement (Second) of Conflict of Laws*, §182 which reads as follows:

> "§182. Effect of Two Statutes Governing Injury
>
> "Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister state also is applicable."

equivalent Virginia law. The very brief affirmance by the Court makes it evident that the issue is no longer one of consequence in that Circuit and that the *McCartin* line of reasoning will prevail.[6]

The intracircuit conflict mentioned *supra* concerns the contemporaneous case of *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs,* F.2d , No. 77-1886 (4 Cir. September 21, 1978). In that matter, the claimant initially failed in Virginia to establish a causal relationship between his respiratory problem and his work activity. He then filed a claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, which also is the Workers' Compensation Act for the District of Columbia as adopted in 36 D.C. Code §501. After successful prosecution of the federal remedy, the employer, on appeal, raised the issue of the exclusivity of the section discussed previously, Va. Code §65.1-40. The unanimous panel found the section to be no barrier to pursuit of a remedy under the Longshoremen's Act. As the Court noted,

> . . . [E]ven assuming that under the reasoning of *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943), the adjudication of a state compensation claim could in some circumstances bar later proceedings under the Federal Act, it is obvious, especially from our discussion of the "exclusivity" provision of the Virginia statute, that the reasoning of *Industrial Commission v. McCartin,* 330 U.S. 622 (1947), not *Magnolia,* is controlling

[6]The Fourth Circuit's reliance on *Gasch v. Britton,* 202 F.2d 356 (D.C. Cir. 1953) creates further uncertainty in light of *Boughman,* which went unmentioned, as well as *Wood v. Aetna Casualty,* 260 Md-651, 273 A.2d 125 (1971), which specifically approved of a second award in the District after an earlier Maryland award. This latter case, in effect, overruled *Gasch v. Britton.* Again, the Maryland statute is much like Virginia's.

> in this case and that no valid "full faith and credit" issue is raised by the federal award.
> *Id.* at p. 8 of the slip opinion.

This unequivocal statement is completely irreconcilable with the majority view in the opinion below, and the later attempt by the Court to explain its rationale in *Pettus* fails to resolve the issue.[7]

While this intracircuit difference is of less consequence to this Honorable Court than a conflict *between* circuits, the problem still is of considerable magnitude. Petitioner submits that this dichotomy will serve to produce additional litigation as other circuits cast about for guidance on the issue at hand. The end result may very well be productive of petitions for certiorari to this Court regardless of the outcome of the case at the circuit level. Resolution of the conflicts enumerated herein, in petitioner's respectful submission, will place a limit on repetitive litigation.

Petitioner further asserts that the decision below is erroneous in another area which in turn is the subject of conflict between the Fourth and Fifth Circuits. In the majority opinion, the Court indicated that there were identical questions raised before the Virginia and District of Columbia administrative agencies and that the unappealed Virginia determination therefore was conclusive and binding on the District. Thus, the Virginia decision allegedly had a *res judicata* effect, absolutely barring the subsequent District of Columbia action. Petitioner submits, however,

[7]In the panel's Per Curiam Addendum, the Court stated that claimant Jenkins could proceed in Newport News under the Federal Act as the inability to prove causal relationship under the Virgina law was jurisdictional. The Court in Newport News specifically noted that jurisdiction was *not* the basis for the Industrial Commission's denial of benefits, but rather it was based on the merits of claimant's case, jurisdiction having been presumed at the outset. Thus, the Addendum is incorrect on this point, thereby removing the basis for its remaining views.

that the two sections, which involve refusal of surgery, differ substantially and that the Virginia courts had neither the right nor the ability to litigate petitioner's rights under the District of Columbia's law.

As the dissent of Judge Hall notes, the exclusive remedy provision of the Virginia Act bars only a common law action against one's employer. Thus, the administrative agency in Virginia could only determine a claimant's compensation rights and obligations under the requirements of Virginia law. That tribunal had no right to determine *sua sponte* whether a claim might also be compensable under District of Columbia law. Under these circumstances, it is evident that the Secretary of Labor, as fact finder, was free to determine, as previously unlitigated, the issue surrounding petitioner's declination of surgery under District law and was not foreclosed by the Virginia statute or by the doctrine of *res judicata*. *See Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs, supra,* for a discussion of this same issue, with a result favorable to the injured worker.

Similarly, the panel's view that the two statutes are identical and that such identity serves as a bar to a later award in the District is erroneous.[8] It is clear from a reading of the sections that they vary materially. Section 65.1-88 of the Virginia Code, as applicable at the time of injury, read as follows:

> The refusal of the employee to accept such [surgical] service when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Industrial Commission, the circumstances justified the refusal.

[8]This issue is more properly one of collateral estoppel rather than *res judicata*, although not denominated as such by the majority.

The pertinent section under the District of Columbia's Act, 33 U.S.C. §907(d) (Supp. V, 1975) states:

> . . . If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

Briefly stated, the language of the two sections demonstrate three separate differences: 1) The Virginia law dictates a cessation of benefits unless the circumstances justify the refusal of surgery while in the District, the adjudicatory body must first determine whether the refusal is reasonable *and* whether it then may still be justified by the circumstances. Under District law, a refusal may be unreasoanble and yet justified by the circumstances. This is a two part versus a one part test; 2) Under Virginia law, the burden of proof is placed entirely on the claimant to demonstrate justification for his refusal while in the District the burden of proof is first imposed on the Secretary to prove unreasonableness and then, and only then, does it shift to the claimant to offer proof of justification; 3) Finally, the Virginia section is mandatory in operation, whereas the District law is permissive, permitting the *possible* suspension of benefits if circumstances warrant.

The focal point of the foregoing differences is the fact that the general approach to the District's Compensation Act is less stringent than in Virginia. Manifestly, a claimant has a far heavier burden of persuasion in Virginia. As the courts have stated, relitigation of an issue is not precluded by collateral estoppel where the party against whom the

doctrine is invoked had a heavier burden of persuasion on the particular issue in the first action than he does in the second. *Young & Company v. Shea*, 397 F.2d 185 (5 Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *Strachan Shipping Company v. Shea*, 276 F.Supp. 610 (S.D. Tex. 1967), *aff'd per curiam*, 406 F.2d 521 (5 Cir. 1969), *cert. denied*, 395 U.S. 921 (1969). See also *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs, supra.* The action by the Fourth Circuit in this case puts it at odds with the Fifth Circuit as to the application of collateral estoppel when essentially the same Act is construed.[9] The likelihood of increased litigation is present wherein not inconsiderable sums of money are involved, with each side citing the case which is most favorable to its position.

In summary, petitioner believes that the lingering *Magnolia-McCartin* controversy as well as the attendant *res judicata* problems can be laid to rest by a re-examination of the applicable principles by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9]Although the District has adopted the Longshoremen's Act as its own, there are certain obvious references to vessels, navigable waters, situs of employment and the like which obviously have no application to the District.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2230

George Pettus,
(Claimant) Respondent,
v.

American Airlines, Inc. (Employer)
and Commercial Insurance Company of
Newark, New Jersey (Carrier),
Petitioners,

Director, Office of Workers' Compensation
Programs, United States Department of Labor,
Respondent.

On Petition for Review of an Order of the United States Department of Labor, Benefits Review Board.

Argued June 8, 1978 Decided September 26, 1978

Before Bryan, Senior Circuit Judge, Widener and Hall, Circuit Judges.

Joseph P. Dyer (Siciliano, Ellis, Sheridan & Dyer on brief) for Appellants; Joshua T. Gillelan, II, Attorney, U.S. Department of Labor and Mark L. Schaffer (James A. Mannino, Ashcraft, Gerel and Koonz on brief) for Appellee.

Albert V. Bryan, Senior Circuit Judge:

American Airlines, Inc. and its employees' compensation insurance carrier, Commercial Insurance Company of Newark, New Jersey, appeal a final order of the Benefits Review Board, awarding American employee George Pettus benefits under the Longshoremen's and Habor Workers' Compensation Act, (Longshoremen's Act), 33 USC § 901 et seq., made applicable to the District of Columbia by the Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973). We reverse.

While seeking employment in 1969, Pettus was told by a District of Columbia employment agency that American Airlines had job openings. Going there again for an interview with American's personnel, he learned there would be a position available. The next day Pettus and several other men were transported from the agency's office in the District to National Airport in Virginia, for processing by the American personnel department.

After obtaining the employment, Pettus was assigned to duties at the Airport in 1969 as a fleet service clerk in the "line cargo group," loading and unloading planes. While so engaged on May 10, 1972 he suffered an injury to his back. He applied for and was allowed workmen's compensation benefits by the Industrial Commission of Virginia, at the rate of $62 per week from May 10, to July 1, 1972 and from July 15, 1972 to May 16, 1973 under the Virginia Workmen's Compensation Act. Code of Virginia, 1950, §65.1-1 et seq. These payments were terminated, as of May 16, 1973, following a decision after hearing by the Commission that the claimant had unjustifiably refused to undergo recommended back surgery. With no appeal taken to the Supreme Court of Virginia, the decision became final. Code of Virginia, 1950, §65.1-98.

On June 28, 1974, Pettus filed a claim for compensation under the District of Columbia Workmen's Compensation

Act (DC Act). Initially, benefits were denied him when an Administrative Law Judge found the claim not to fall within the jurisdictional scope of the Longshoremen's Act. The Benefits Review Board, however, concluded there were sufficient contacts of claimant with the District to confer jurisdiction there and reversed. Pettus v. American Airlines, Inc., 3 BRBS 315, BRB No. 75-197 (March 19, 1976). On remand, another Administrative Law Judge awarded the claimant benefits based upon temporary total disability. When the Board affirmed this decision on August 22, 1977, the present appeal was brought.

We accept the Board's determination of jurisdiction, but that is not to say we accept its exercise thereof in favor of the claimant. Cardillo v. Liberty Mutual Co., 330 US 469 (1947). Here, reversal is mandated by the rules of res judicata and the "full faith and credit clause" of the Constitution. These principles required the Board to abide by the order of the Virginia Commission refusing Pettus further compensation.

Since the parties in Virginia and the District of Columbia are identical, the next question is whether "the right, question or fact", Southern Pacific Railroad Co. v. United States, 168 US 1, 48 (1897), put to rest in the Virginia proceeding is the same as that raised under the Longshoremen's Act before the Review Board.[1] This identity of issue will at once become apparent.

The State statute, at the time, provided that "the employee shall accept . . . such surgical and hospital service . . .

[1]The fact that the decision-maker in the initial adjudication was an administrative agency is of no consequence. For "[R]es judicata effect may attach to determinations of administrative agencies in appropriate circumstances. United States v. Utah Construction & Mining Co., 384 US 394, 422 (1966). *See* Industrial Comm'n of Wisconsin v. McCartin, 330 US 662 (1947); Magnolia Petroleum Co. v. Hunt, 320 US 430 (1943)." Mitchell v. National Broadcasting Co., 553 F2d 265, 268-69 (2 Cir. 1977).

as may be deemed necessary by the attending physician or the Industrial Commission." Moreover, "[T]he refusal of the employee to accept such service . . . shall bar the employee from further compensation . . . unless, in the opinion of the Industrial Commission, the circumstances justified the refusal." Code of Virginia, 1950, § 65.1-88. In Section 7(d) of the Longshoremen's Act, 33 USC § 907(d), it is declared that if "the employee unreasonably refuses to submit to medical or surgical treatment, . . . the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, . . . unless the circumstances justified the refusal."

The common issue is thus whether the employee's refusal was "justified" under the circumstances as expressed in the State law, or "unreasonabl[e]" as the District of Columbia law puts it. Virginia's Commission saw it unjustified. Unappealed this resolution was "conclusive and binding as to all questions of fact." Code of Virginia, 1950, § 65.1-98.

However, the doctrine of res judicata also exacts that the determination has been made by the Virginia Commission after a full and fair adjudication of its legal and evidential factors. United States v. Utah Construction & Mining Co., 384 US 394 (1966). A review of the record makes plain that the procedures afforded the appellee in Virginia and the proof adduced before the State agency abundantly met this criterion.

Upon employee's refusal to accept surgery, a hearing was held thereon before one of the members of the Commission in Alexandria, Virginia. Claimant was represented by counsel. After receiving evidence, in the form of medical reports and the injured employee's *ore tenus* testimony, the Commissioner on October 9, 1973 held the claimant's refusal was not justified.[2] There followed an order terminating

[2]The attending orthopaedic surgeon had recommended surgery to correct the condition. When the employee refused, a period of conservative treatment was attempted, but it was finally concluded that surgery was necessary to restore the claimant to an employable status.

compensation as of May 16, 1973. Upon appeal to the full Commission and a review hearing on January 8, 1974 in Richmond, Virginia, the Commissioner's order was upheld and adopted as the Commission's own. Code of Virginia, 1950, § 65.1-98. Moreover, at that stage the award assumed the status of a judgment of a court of record of the State. The statute, Code of Virginia, 1950, § 65.1-100,[3] provided:

> "Any party in interest may file in the circuit . . . court of the county or city in which the injury occurred, . . . an award of the Commission . . . whereupon the court, . . . shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, . . . as though such judgment had been rendered in a suit duly heard and determined by the court."

Thus, without question the decision of the Commission operates as an absolute bar to any other action on the same facts in the courts of Virginia.

Therefore, under res judicata the Benefits Review Board, when presented with the Virginia judgment, was compelled to give it the same force and effect as it possessed in Virginia.[4]

[3]Recodified, the citation of this section appears in the 1977 Cumm. Supp to the Code of Virginia, 1950, as §65.1-100.1.

[4]The Constitution of the United States, Art. IV, Section 1, fathered the Act of Congress, now Section 1738 of Title 28, United States Code:

> § 1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> * * * *
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation

Notwithstanding, claimant urges that he still had the right to proceed under the District of Columbia law for compensation benefits, with only the obligation to credit thereon any award he procurred in Virginia. Precedent of last resort refutes this contention.

It begins with Magnolia Petroleum Co. v. Hunt, 320 US 430 (1943). There the Chief Justice exhaustively explored the law asserted upon the privilege and found it without acceptable basis. A second and separate proceeding in another jurisdiction upon the same injury after a prior recovery in another State, he declared for a majority of the Court, was precluded by the full faith and credit clause.

The factual foundation of the case was that an employee, a resident of Louisiana, while engaged in the drilling of oil wells for his employer, Magnolia, in Texas was injured in his work. He obtained an award of compensation in Texas under its workmen's compensation law. Payments were made by Magnolia's insurer in accordance with the award, which became final under the Texas statute. Thereafter claimant brought a like proceeding in a State court in Louisiana. His employer excepted on the ground that recovery was barred as res judicata by the Texas award. This defense was overruled and judgment went for the employee for the sum fixed by the Louisiana law, after deducting the Texas payments. On affirmance by the Supreme Court of Louisiana, certiorari brought the case to the United States Supreme Court where it was reversed.

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of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

As in Virginia, the Texas statute provided that the award would be in lieu of any other recovery for the injury by the employee, the Act stating that employees "shall have no right of action against their employer . . . for damages for personal injuries, . . . but such employees . . . shall look for compensation solely to the [insurer] . . . ." Texas Rev.Civ.Stat., Title 130, Art. 8306, § 3. Again, similarly to the Virginia law, an award which as become final "is entitled to the same faith and credit as a judgment of a court." *Magnolia, supra,* at 435. Continuing, the Chief Justice said:

> "in the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that the law is of controlling force in the courts of that state with respect to the same persons and events . . . .
>
> "But it does not follow that the employee who has sought and recovered an award of compensation in either state may then have recourse to the laws and courts of the other to recover a second or additional award for the same injury. Where a court must make choice of one of two conflicting statutes of different states and apply it to a cause of action which has not been previously litigated, there can be no plea of res judicata. But when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become res judicata in one state, must be recognized as such in every other." At 436-37.

Among the dissenters was Justice Black. However, the foremost ground of his difference was that the parties were not the same in the two proceedings — that the one in Texas was against the insurer only and the award limited to a release of the insurer, while in Louisiana the employer's liability, as well as the insurer's, was before the Louisiana tribunal. Thus his difference would not run to the proceeding before us.

Claimant further presses that *Magnolia* was overruled in Industrial Commission of Wisconsin v. McCartin, 330 US 622 (1947). There, decision favored the claimant's contention that he was entitled to proceed in another State, even after he had prevailed earlier in a like proceeding elsewhere. The employee was a bricklayer for McCartin, and was, like his employer, a resident of Illinois. The contract of employment was made in Illinois, but the employee worked in Wisconsin, driving back and forth between his Illinois home and his Wisconsin job. Suffering an injury in Wisconsin, he there filed for compensation with the Industrial Commission of that State on June 7, 1943. Both claimant and insurer objected to jurisdiction of the Wisconsin Commission. On July 20, 1943, the employee applied to the Illinois Commission for adjustment of the claim.

The Wisconsin Commission on October 11 wrote the insurance carrier that the employee had been informed that under Wisconsin law he was entitled to proceed also under the Illinois Compensation Act, and thereafter claim compensation under the Wisconsin law, less any amounts paid him under the Illinois Act. In reply the carrier stated that it understood that if payment were made to the employee under the Illinois statute, credit would be given for those payments in the event of a Wisconsin award. So understanding, the insurer paid the employee compensation under the Illinois law.

On November 3, 1943 a settlement contract was made between the claimant-employee and his employer but it

stated that: "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin". Nevertheless, that State's Supreme Court applied *Magnolia* and refused to allow the Wisconsin proceeding. The United States Supreme Court reversed.

In so doing the Court unequivocally disavowed any intendment whatsoever to modify *Magnolia*. The distinction between the two was made altogether plain. In *Magnolia* the award "was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state. And since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute". At 626-27, (citation omitted). It concluded that these circumstances did not exist in *McCartin*, the Illinois award being "different in its nature and effect from the Texas award" in *Magnolia*. At 627. More importantly, prosecution of the proceeding in Wisconsin was virtually under stipulations of consent.

The United States Court of Appeals for the District of Columbia Circuit had occasion in Gasch v. Britton, 202 F2d 356 (1953), to consider the influence of *McCartin* upon *Magnolia*. In denying there was any modification of *Magnolia* by *McCartin*, Judge Proctor stated:

> "They [appellants] go so far as to insist that McCartin overrules the Magnolia Petroleum Co. decision. We think that is not so. McCartin complements, rather than opposes the earlier decision."
> At 358.

Turning to the Virginia statute, we find it as exclusive of a second proceeding as the Chief Justice in *Magnolia* found the Texas law. Under the statute, he noted an award "is ex-

plicitly made by statute in lieu of any other recovery for injury to the employee". 320 US at 435. Quoting the Act, *infra* at 8, §3, he said that employees subject to it "shall have no right of action against thier employer . . . but . . . shall look for compensation *solely* to the [insurer]". (Accent added) *id.* How precisely the Virginia law fits into the Texas mold appears at once upon reading Virginia's Workmen's Compensation law:

> "§ 65.1-40. Employees rights under the Act exclude all others. — The rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies of such employee, . . . *at common law or otherwise, ...*" *(Accent added.)*

In verification of our construction of this section, the Virginia Law Review[5] observes: "Under the Workmen's Compensation Act, any collateral action the employee might have against his employer is barred unless the employee expressly waives coverage of the Act's provisions". A footnote thereto adds: "Employees may waive coverage of the Act . . . but if they do not, their right to compensation excludes any other claims they may have against the employer. . . ."

The order of the Benefits Review Board awarding compensation to George Pettus will be vacated for the foregoing reasons

VACATED.

[5] "Workmen's Compensation", *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 *Va. L. Rev.* 1632 (1973).

HALL, CIRCUIT JUDGE, DISSENTING:

I must respectfully dissent from the majority opinion because I think it misconstrues the application of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) and *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947), and because it ignores the principle — virtually axiomatic in this area of the law — that workmen's compensation laws are to be construed liberally in furtherance of their remedial purpose.

I. FULL FAITH AND CREDIT

The lynchpin of the Supreme Court's holding in *Magnolia* was the Court's finding that the Texas workmen's compensation statute at issue was intended to be exclusive of all other remedies, including remedies afforded by the workmen's compensation laws of other states. The Court based its conclusion on an express statutory provision and on Texas' judicial interpretation of the statute:

> [U]nder this statute a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state.

Magnolia Petroleum Co. v. Hunt, 430 U.S. at 435 (citations omitted). From this the Court apparently inferred that the converse was also true: that once a remedy was obtained pursuant to the Texas statute, it operated to preclude successive awards pursuant to other states' workmen's compensation laws by application of full faith and credit.

Significantly, the Court withheld the question of the full faith and credit or *res judicata* effect of a workmen's compensation award made pursuant to a statute *not* held to be exclusive.

> We have no occasion to consider what effect would be required to be given to the Texas award *if the Texas courts held that an award of compensation in another state would not bar an award in Texas,* for as we have seen, Texas does not allow such a second recovery.

Id. at 443 (emphasis added). This question was answered four years later in the Court's unanimous opinion in *McCartin*, holding that an award pursuant to the Illinois workmen's compensation statute was *not* a bar to a subsequent award in Wisconsin. The Court first noted that an award under the Illinois statute operated to bar any right of action under Illinois common law or under the Illinois Personal Injuries Act. *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. at 627.

> To that extent, the [Illinois] Act provides an exclusive remedy.
>
> But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction.*

Id. at 627-28 (emphasis added and citations omitted).

As the majority correctly notes, in *McCartin* there was a settlement between the parties which operated as a consent

to the subsequent award in Wisconsin. Thus, the Supreme Court did not rest its decision solely upon its construction of the Illinois statute. *Id.* at 628. But the importance of the statutory construction was re-emphasized when the Court formulated its holding in *McCartin*, and appears to be the principal ground of distinction from *Magnolia*.

> But when the reservation [the agreement] in this award is read against the background of the Illinois Workmen's Compensation Act, it becomes clear that *the reservation spells out what we believe to be implicit in that Act — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state.*

Id. at 630 (emphasis added).

McCartin did not overrule *Magnolia*. However, most commentators agree that when state compensation laws are evaluated in light of the admonition in *McCartin* — for "unmistakable language" indicating that such laws are exclusive of any rights an employee may have under other states' compensation laws — successive awards should be sanctioned in almost every jurisdiction. *See* 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§85.10-.40 (1976). Most courts confronted with this issue have so interpreted the compensation statutes. LARSON *supra* at §85.40. This reasoning is in accord with the accepted notion that such laws should be construed liberally in favor of employees, and with sister states' interests in seeing that such employees do not become their public charges.

Turning to the Virginia statute at issue, Code of Va. §65.1-40 (1973 Replacement Volume), I cannot agree with the majority's conclusion that it is exclusive of any rights an employee may have under the workmen's compensation laws of another state. Certainly it is exclusive of any right of action against the employer under the common law of

Virginia, *e.g., Sykes v. Stone & Webster Engineering Corp.*, 186 Va. 116, 41 S.E.2d 469, 471 (1947), even if the compensation award was rendered in a different state. *Home Idem. Co. v. Poladian*, 270 F.2d 156 (4th Cir. 1959). Presumably it would also be exclusive of any other Virginia statutory remedies, as was the Illinois statute construed in *McCartin*. But I cannot find a single case in which the Virginia courts have addressed the issue of whether the statute operates to bar awards under the compensation laws of other states; and the majority cites no law or legislative pronouncements to this effect.[1] Indeed, decisional law emphasizes that the remedy under the statute is intended to be exclusive only as to an employee's right to sue his employer for damages. *Fauver v. Bell*, 192 Va. 518, 526, 65 S.E.2d 575, 580 (1951). Therefore, the majority ignores the mandate of the *McCartin* court, the great weight of authority, and the principles of workmen's compensation law to read total exclusivity into the silent Virginia statute.

II. RES JUDICATA AND COLLATERAL ESTOPPEL

Assuming that a remedy under the Virginia statute is not exclusive of one under the laws of the District of Columbia, is Pettus' claim otherwise barred by operation of either *res judicata* or collateral estoppel? I think not.

The doctrine of *res judicata* bars relitigation of issues already decided by a court of competent jurisdiction in a lawsuit between the same parties, or litigation of issues which could have been raised and decided in the previous lawsuit.[2] *See* 1B MOORE'S FEDERAL PRACTICE ¶0.405

[1]The majority cites 59 Va.L.R. 1632 (1973) as support for its holding: this article collects and discusses only cases standing for the accepted proposition that an award under the Virginia statute operates as a bar to any other rights at common law against the employer.

[2]For purposes of this discussion I will assume that there was identity of parties in the Virginia and District of Columbia proceedings.

(1974). Applying these principles in the context of workmen's compensation awards, it is clear that if the remedy under one state's law is exclusive of any other state's statutory remedies, the doctrine would apply where a subsequent award is sought in a second state. In such a case there is an initial choice of law made in the original proceeding, and that choice is accorded *res judicata* finality. *See Magnolia Petroleum Co. v. Hunt*, 320 U.S. at 437. However, if the remedy under one state's law is not exclusive, there is no choice of law made. The administrative tribunal in State A determines *only* whether the claim falls under the workmen's compensation law of State A; it does not, and could not, determine whether the claim might also be compensable under the workmen's compensation laws of State B. Thus in a subsequent proceeding in State B, this issue is one not previously litigated and one which could not have been litigated. No *res judicata* effect attaches. *See Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs, et al.*, No. 77-1886 (4th Cir., _____, 1978), Slip Opinion at 8. To hold otherwise would undercut the holding in *McCartin* and render that opinion a nullity.

Here, the Virginia statute at issue is not exclusive of an employee's possible rights under the District of Columbia compensation provisions. The Industrial Commission of Virginia did not, and could not, determine what rights if any Pettus had under those provisions. Thus in the proceeding in the District of Columbia the Secretary was free to determine the issue and his consideration was not foreclosed by the doctrine of *res judicata*.

Although the doctrine of collateral estoppel could apply in the successive award situation, it should not operate as a bar on the facts of this case. The issue is whether the statutory standards governing eligibility for relief in Virginia and the District of Columbia are identical so that it can be fairly said that the question of a claimant's

eligibility is an issue of fact which has been finally determined against him.

Until its amendment in 1975, Code of Va. §65.1-88 (1950) provided:

> The refusal of the employee to accept such [surgical] service when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Industrial Commission, the circumstances justified the refusal.

Section 7(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §907(d) (Supp. V, 1975), provides:

> . . . If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

It is clear that the two statutes vary materially. First, the Virginia statute provides only one standard by which a claimant's refusal to submit to surgery is evaluated: whether circumstances justify the refusal. The District of Columbia statute, on the other hand, has a two-part test: whether the refusal is unreasonable *and*, if so, whether it is justified by the circumstances. Second, the burden of proof is different in the two statutory schemes. Under the Virginia statute, the entire burden is on the claimant to show that his refusal to have surgery is justified. Under the District of Columbia statute, the initial burden is on the

Secretary to show that refusal to have surgery is unreasonable; only after the Secretary carries his burden must the claimant offer proof that the refusal was nevertheless justified. Finally, the operation of the Virginia statute is mandatory: unless the claimant shows that refusal to undergo surgery was justified, it ". . . *shall* bar the employee from further compensation . . . ." (Emphasis added). On the other hand, the operation of the District of Columbia statute is permissive: ". . . the Secretary *may* . . . suspend the payment of further compensation . . . ." (Emphasis added).

In view of the variance in the burden of proof and the allocation of that burden in the Virginia and District of Columbia proceedings, the finding of the Virginia Industrial Commission — that Pettus did not *prove* that his refusal *was* justified — cannot estop litigation in the District of Columbia on the issue of whether that refusal was unreasonable and unjustified. *See Young & Co., v. Shea*, 397 F.2d 185, *rehearing denied*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

Since I believe that the District of Columbia was not precluded by full faith and credit, *res judicata* or collateral estoppel from entertaining Pettus' claim, I would affirm the decision of the United States Department of Labor, Benefits Review Board.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2230

George Pettus,
(Claimant) Respondent,

v.

American Airlines, Inc. (Employer)
and Commercial Insurance Company of
Newark, New Jersey (Carrier),

Petitioners,

Director, Office of Workers' Compensation
Programs, United States Department of
Labor,

Respondent.

Order and
Addendum to Opinion filed
September 26, 1978

FILED: January 4, 1979

ORDER

Upon a request for a poll of the court on the suggestions that this case be reheard en banc, less than a majority of the judges in regular active service having voted in favor of rehearing en banc,

It is accordingly ADJUDGED and ORDERED that rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petitions for rehearing and is of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing shall be, and they hereby are, denied.

It is further ORDERED that the addendum to the opinion attached to this order shall be, and the same hereby is, filed and made a part of the opinion in this case.

With the concurrence of Judge Bryan.

Judge Hall dissents. He would affirm the award.

/s/ H. Emory Widener, Jr.
For the Court

FILED: January 4, 1979

ADDENDUM

PER CURIAM:

Petitions filed by George Pettus and the Director, Office of Workers' Compensation, for rehearing of the decision herein of September 26, 1978, have been denied, but we deem it advisable to correct a mistaken impression of the petitioners. They charge that this opinion is in conflict with ours of September 21, 1978, in No. 77-1886, Newport News Shipbuilding and Dry Dock Company v. Director, OWCP.

The conflict is said to be manifest in the denial to Pettus of the right to seek compensation under the District of Columbia Workmen's Compensation Act (Longshoreman's and Harbor Workers' Compensation Act) after the Virginia Commission had dismissed his claim for refusal to comply with its order allowing compensation, but that in *Newport*

News Shipbuilding the right to proceed under the District of Columbia law was granted employee, Jenkins, after his claim had been rejected by the Virginia Commission.

Actually, there is no inconsistency between the two adjudications. Pettus had originally been awarded compensation by the Virginia Commission with no doubt that his injury was work-related. Thus, there was no necessity for him to seek the remedy afforded by the D.C. Act in order to be compensated.

On the other hand, Jenkins had no claim whatsoever under the Virginia law, because there was no relationship *proved* between his injury and work. This was a finding of a jurisdictional fact, negating the jurisdiction of the Virginia Commission. It was not a finding on the merits of the claim. At all events, no relief was obtainable by him under the State law.

However, the absence initially of *proof* of this essential factor was not a bar under the Federal law, because it gave him a presumption of work-relatedness to start with, an assistance unavailable to him in the Virginia proceeding. Furthermore, since his burden of proof was thus lighter under the Federal statute, the result of the litigation before the Virginia Commission had no collateral effect and Jenkins could embrace the Federal forum without first proffering proof of the work relationship. In so doing he was making out a different case, one not entertainable in Virginia.

Thus the judgments of Pettus and Jenkins rested on separate bases. Jenkins could not recover under the State law but Pettus could. Obviously, these conclusions were not mutually contradictory.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

GEORGE PETTUS Claimant-Respondent	)	
v.	)	FILED AS PART OF THE RECORD AUG 22 1977
AMERICAN AIRLINES, INC.	)	
and	)	/s/ Susan Ranbro by MN Clerk
COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY Employer/Carrier-Petitioners	)	Benefits Review Board BRB No. 77-115 DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	

Appeal from the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

James A. Mannino (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Joseph Dyer (Siciliano, Ellis, Sheridan & Dyer), Arlington, Virginia, for the employer/carrier.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Member.

Hartman, Member:

This is an appeal by the employer/carrier from a Decision and Order (75-DCWC-19) of Administrative Law Judge

Robert S. Amery pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended to the District of Columbia, 36 D.C. Code §501 *et seq.* (hereinafter referred to as the Act).

Claimant who worked for employer as a cargo handler at National Airport in Virginia injured his back on May 10, 1972, while pushing a piece of cargo on a jammed cargo belt. Claimant is a resident of the District of Columbia but initially received compensation under the Virginia workmen's compensation act until May 16, 1973. These payments were officially terminated on October 9, 1973, when a Commissioner of the Virginia Industrial Commission concluded claimant's refusal to undergo back surgery was not justified. That decision was affirmed by the full commission on February 11, 1974. Claimant then filed for benefits under the Act.

Administrative Law Judge Smith denied benefits finding claimant was not covered under the Act. The Board in *Pettus v. American Airlines, Inc.*, 3 BRBS 315, BRB No. 75-197 (March 19, 1976) reversed this finding and remanded the case for further proceedings. Administrative Law Judge Amery issued a Decision and Order on Remand on May 12, 1976 in which he awarded claimant benefits for temporary total disability concluding claimant's refusal to undergo surgery was reasonable, and therefore, compensation payments could not be suspended under Section 7(d) of the Act. 33 U.S.C. §907(d). Employer/Carrier (hereafter, the employer), however, had appealed the Board's Decision to the Court of Appeals for the Fourth Circuit. Administrative Law Judge Amery denied reconsideration of his May 12 Decision and Order on June 18, 1976. His decision was then appealed to the Board. However, the Board in a letter, dated July 8, 1976, ruled it could not act upon the appeal inasmuch as the case had been appealed to the Court of Appeals for the Fourth Circuit. The Court dismissed em-

ployer's appeal of the Board's decision as interlocutory on November 10, 1976. Administrative Law Judge Amery issued a Supplemental Order on December 9, 1976 in which he incorporated his May 12, 1976 Decision and Order.

Employer has appealed contending that the administrative law judge erred in finding the claim within the jurisdiction of the Act, in failing to give full faith and credit to the Decision of the Industrial Commission of Virginia, in not finding the claim barred by the doctrines of res judicata and/or collateral estoppel, and in not finding that claimant's refusal to submit to surgery was unreasonable. Employer also argues Administrative Law Judge Amery lacked jurisdiction to issue his orders of May 12, 1976 and December 9, 1976.

The Board in its prior decision in this case concluded that claimant was covered under the Act, and that the fact claimant received a prior award under the Virginia workmen's compensation act would not preclude an award under the Act. We will not repeat that discussion here.

Employer also contends that a compensation award should be suspended as long as claimant refuses to submit to corrective surgery on his back. Employer first argues that the question whether claimant's refusal to submit to surger was reasonable had already been decided by the Virginia Industrial Commission, and that the administrative law judge was bound by this finding under the doctrine of collateral estoppel.

However, where the standards of proof between two proceedings vary greatly, the findings from the first proceeding have no binding effect on the conclusion the administrative law judge may reach. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

Under the Act, if a claimant *unreasonably* refuses to submit to surgery, "the Secretary *may*, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid . . . unless the circumstances *justified* the refusal." (emphasis added) 33 U.S.C. §907(d). Thus, under the Act, there is a two-fold test. The refusal must be both "unreasonable" and not "justified" by the circumstances. Further, it appears that even then the Secretary still has the discretionary power to suspend or not suspend compensation payments. Moreover, under the Act, it must be remembered that, in view of its humanitarian purposes, all doubts are to be resolved in a claimant's favor. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

Under the Virginia act effective at the time of Commissioner's decision, *any* refusal to sbumit to surgery was grounds for suspension of compensation "unless in the opinion of the Commission, the circumstances justified the refusal." Va. Code §65.1-88. The Virginia act did not have a two-fold test. Further, it has not been shown the Commissioner was governed by the same liberal rules of construction as under the Act. Clearly, inasmuch as the standards between the two proceedings varied greatly, the Commissioner's finding would not be binding on a decision under the Act. This is particularly true in that it appears that under the Act, the Secretary may decide not to suspend compensation even if he concluded the refusal to submit to surgery was both unreasonable and unjustified.

Employer next argues that under the Act, the claimant's refusal to submit to surgery was both unreasonable and unjustified. The administrative law judge determined that claimant's refusal to undergo surgery was not an adequate basis for suspending compensation payments under Section 7(d). The Board has held in *Unger v. National Steel & Shipping Co.*, 5 BRBS 377, BRB No. 76-233 (Jan. 25, 1977), that it would appear from a reading of Section 7(d) that it is the

province of the Secretary, not an administrative law judge, to make a determination whether compensation payments should be suspended under the Act. Therefore, it would appear that any finding on this point by the administrative law judge would have no direct effect.

If the administrative law judge did have such authority, the Board would of course agree with his conclusion that claimant's refusal to submit to surgery was not unreasonable. Dr. Levin indicates that the spinal fusion recommended for claimant is a serious operation. *See* 1 A Larson, *The Law of Workmen's Compensation* §13.22. Further, claimant who has an asthmatic condition had a very real fear he would not come out of the anesthesia. He stated he did not want to risk leaving his children orphans. (Claimant's wife died of pneumonia after being hospitalized following an accident). Considering these factors, the Board agrees that claimant's refusal to submit to surgery was indeed reasonable.

Employer further contends that the administrative law judge lacked jurisdiction to render a decision in this case. It also argues that the administrative law judge erred in issuing his Decision and Order on remand without giving the parties an opportunity to present additional evidence and/or briefs.

Even assuming Administrative Law Judge Amery was without authority to issue his Decision and Order filed on May 19, 1976 and his Decision on Reconsideration on June 30, 1976, inasmuch as the case had been appealed to the Court of Appeals for the Fourth Circuit, any defect was cured by his Order of December 9, 1976 in which he incorporated these prior decisions. This Order was issued after the Fourth Circuit had dismissed employer's appeal before it as interlocutory.

As to employer's contention that it should have been allowed an opportunity to present evidence and argument

to Administrative Law Judge Amery, the Board concludes that employer had been given full opportunity to present all necessary evidence and argument before Administrative Law Judge Smith. These materials were before Administrative Law Judge Amery. Additional proceedings were not necessary to render a decision.

Accordingly, the Board affirms the administrative law judge's award of benefits for temporary total disability.

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

We concur:

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Julius Miller
Julius Miller, Member

Dated this 22nd day
of August 1977.

SERVICE SHEET

BRB NO. 77-115: GEORGE PETTUS v. AMERICAN AIRLINES, INC. & COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J.

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U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
GEORGE PETTUS Claimant	:	
v.	:	
AMERICAN AIRLINES, INC. Employer	:	Case No. 75-DCWC-19
and	:	OWCP No. 40-79352
COMMERCIAL INSURANCE CO. OF NEWARK, NEW JERSEY Carrier	:	

James A. Mannino, Esq.
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For the Claimant

Joseph Dyer, Esq.
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Suite 800, The Rosslyn Building
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Arlington, Virginia 22209
For the Employer/Carrier (Respondents)

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER ON REMAND

Now upon remand from a decision of the Benefits Review Board, this is a claim for compensation under provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 USC 901 *et seq.*, as made applicable to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.* (hereinafter collectively referred to as the Act) and the regulations governing the administration of the Act, 20 CFR 701 and 702. The claim was heard at a formal hearing before Administrative Law Judge Samuel J. Smith at Washington, D.C. on December 10, 1974. In his DECISION AND ORDER in the above-styled case, issued on June 30, 1975, Judge Smith denied compensation on the basis of a lack of jurisdiction under the Act.

Subsequently, the claimant, together with the Solicitor of Labor on behalf of the Director, Office of Workers' Compensation Programs, appealed the aforementioned decision to the Benefits Review Board. On March 19, 1976 the Board rendered its decision (BRB Nos. 75-197 and 75-197A) reversing the decision of Judge Smith and holding, in part, as follows:

> "As the claimant herein resides in the District, and could become a public charge therein, the District has a legitimate and compelling interest to protect not only the claimant injured in the course of employment, but all of its residents who may be affected if the claimant is inadequately compensated for injury thereby necessitating public assistance. . .
>
> "The decision by the Virginia Industrial Commission is final only in that the claimant is not entitled to further compensation under Virginia law. However, the Virginia compensation statute is not

exclusive and does not preclude recovery for injuries under the District of Columbia Act. . .

"We hold that the fact that the claimant is a resident of the District of Columbia is sufficient to confer jurisdiction under the Act. We further hold that a prior award by the State of Virginia does not preclude a subsequent award under the Act."

The Benefits Review Board remanded the case to this office ". . . for a determination in accordance with this Decision." Judge Smith was not available to take action on this order of remand, as he had previously left this office to take a position with another agency of the Government. The case has been assigned to me for review and for another Decision and Order. Of course the decision of the Benefits Review Board is binding upon me as to the jurisdictional issues cited above. Despite the fact that I did not hear the "live testimony," I am authorized to make determinations involving the credibility of witnesses from the record of the hearing. Kendall v. Bethlehem Steel Corp., 3 BRBS 255, BRB No. 75-205 (1976). A copy of the Benefits Review Board decision in this case was served on the parties and their counsel and none has requested a further hearing or the presentation of additional evidence.

In my opinion the transcript of the hearing contains sufficient evidence for me to make a determination on the merits of the claim. The two remaining issues are: (1) whether the claimant is entitled to compensation for temporary total disability from May 10, 1972 to July 1, 1972 and from July 14, 1972 onward, and (2) whether his refusal to submit to corrective surgery was unreasonable and unjustified under the circumstances.

At the outset of the hearing the parties stipulated to the following matters and I find these to be established:

1. The claimant was injured on May 10, 1972 while working in the course of his employment.

2. A causal relationship existed between the injury the claimant sustained on May 10, 1972 and his disability.

3. The claimant's average weekly wage at the time of his injury was $210. per week.

4. There was an employer-employee relationship between the respondent employer and the claimant at the time of the injury.

5. The claimant has received compensation under the workmen's compensation law of the Commonwealth of Virginia from May 10, 1972 to July 1, 1972 and from July 15, 1972 to May 16, 1973, at the rate of $62. per week, as a result of the May 10, 1972 injury.

The claimant was born May 27, 1938; he is a widower with three children, two of whom (now 12 and 10 years old) live with him and he supports them. As far as his education is concerned, in school he reached, but did not complete, the seventh grade. In 1969 he was employed by the respondent employer, American Airlines. Immediately before that he had worked as a window cleaner for five years, and prior thereto he was a laborer doing construction work for a year, he worked as a laborer for the Arlington County Sanitation Dept. for two years, and for a maintenance service company in Virginia for a year and a half. In general, he has worked as a laborer all his adult life.

He was hired in his last job for the respondent employer in 1969 when he applied at an employment office in Washington, D.C., then was interviewed there by the respondent employer's personnel manager. Subsequently, he and other new employees were transported to Washington National Airport where they received a physical examination, were furnished identification documents, underwent an eight week training program and filled out forms for employment. The claimant's job title was fleet service clerk in the line cargo group. His work was

at the airport and consisted of loading and unloading cargo of all types from airplanes. On May 10, 1972 he was in the belly of an airplance pushing a piece of cargo on a conveyor belt to get it unloaded when it jammed on a ruptured part of the floor of the aircraft. In pushing the cargo, the claimant twisted his back, and fell over the cargo. The lower part of his back felt numb, so he sat on the conveyor belt and came down from the plane. His co-workers helped him off the belt and reported the incident to the supervisor. He had never had any trouble with his back before.

He was brought to the Alexandria Hospital emergency room where x-rays were taken. He was given some pills for his pain and referred to Dr. Stephen Levin, an orthopedic surgeon. Dr. Levin treated the claimant by means of back massage, heat pads and by over a week's hospitalization in traction. About July 1, 1972 the claimant said he wanted to go back to work and Dr. Levin permitted him to do so. At first the claimant was given light work to do, fixing snack kits and medicine in what was called "cabin service," but his union (AFL/CIO Transport Workers) would not allow him to remain on light duties and when he went back to his normal work "in the line," loading and unloading cargo, he found he was incapable of doing it because his back bothered him so much. When he tried to lift things he was unable to straighten back up. He had to stop working on July 15, 1972. Dr. Levin put him back in the hospital again, a myelogram was performed and x-rays were taken. After he came out of the hospital he saw Dr. Levin every week or so thereafter and received massages and heat treatments from him. Dr. Levin gave him a book of exercises and the claimant did the things it suggested, including taking hot showers and soaking in the bathtub.

In 1973 Dr. Levin advised the claimant that the only thing that would cure him would be surgery in the form of a spinal fusion. In arriving at his decision to advise surgery, Dr. Levin had consulted with a neurosurgeon specialist, Dr.

Bortnick, and others. The claimant refused to have this surgery because he had a severe case of asthma that made it difficult for him to breathe at times, and he was afraid that when put under anesthesia for the operation he would never regain consciousness. With two young children to support, the claimant felt this was too much of a chance to take, since the doctor could not guarantee that the surgery would be successful and that there would be no risk to him in the operation. In 1966 the claimant's wife had been in a hospital as a result of an accident. She caught pneumonia in the hospital and died there unexpectedly. The claimant did not want anything similar to happen to him. Dr. Levin advised him to seek the opinions of other people who had had back operations. The claimant said he did so and the reports were unfavorable. He was afraid he would die if he had the operation.

Dr. Levin explained that the alternative to having the surgery was to seek vocational rehabilitation, so the claimant proceeded to the Vocational Rehabilitation Program Office in Washington, D.C., where he took several tests. This took place before September, 1973. The officials there tried to arrange for him to take a rehabilitation training program, but at the time of the hearing, in December, 1974, the claimant had still not done so, although arrangements had been made for the future. He said he wanted to undergo training but had not been able to do so because he did not have enough money to pay a baby sitter to care for his children while he was in training.

The claimant said he tried to find work on his own at such places as Oxon Hill, Md. Institute, Woolworths five and ten cents store, an apartment development near where he lived, several gasoline stations, a Giant Food grocery store and a Drug Fair store, but he was always unsuccessful. He has been unemployed since July 15, 1972, except as a baby sitter, occasionally.

His back bothered him constantly. He suffered sharp pains shooting through his back when walking, or when sitting or standing for any long period of time. Sometimes his left leg became weak and "gave out" on him for minutes at a time. He could not do any lifting of any sort. He took bufferin and aspirin for the pain after he was taken off prescription drugs by the doctor. He said he took these several times a day, every day, until he "hears bells ringing," and he continued to do the exercises suggested in Dr. Levin's booklet, including the hot showers and baths. He slept with a piece of plywood under his mattress and when his back became "real bad" he slept on the floor. He also wore a brace, prescribed by Dr. Levin, on his back at times.

He received $228 per month from welfare or public assistance, but he paid $200. per month rent plus electricity for his living quarters. He also received food stamps. He borrowed money from his sister and others and was in debt.

Reports and letters of Dr. Stephen M. Levin of Alexandria, Va. spanning a period from May 10, 1972 to December 9, 1974 were admitted in evidence. The initial reports diagnosed the injury as a lumbosacral strain; the claimant was started on physical therapy treatments, with heat, rest, bedboard and pain medication prescribed. Dr. Levin stated, "At this point, I feel Mr. Pettus is unable to do any significant lifting, bending or stooping and so would be unable to work." X-rays were negative. By June 30, 1972 Dr. Levin felt the claimant could return to work. On July 7, 1972 Dr. Levin learned the claimant had been having difficulty lifting heavy objects. He was also getting spasms in his back and having pain in straight leg raising on the left. The doctor prescribed butazolidin. On July 14, 1972 the claimant again developed acute back pain in lifting, and he had spasm on the left lumbar musculature. Dr. Levin decided he had apparent weakeness of dorsiflexion of the left great toe and hypesthesia of the entire left lower ex-

tremity. The claimant was put on bedrest at home. On August 8, 1972 he was hospitalized by Dr. Ronald Bortnick and a myelogram was performed, but no protruding disc was noted. The claimant had market pain and spasm.

By April 9, 1973 the claimant's condition was reevaluated but the situation was essentially unchanged. He had marked lumbar muscle spasm with marked limitation of motion and pain even at rest, with marked pain when stressing the L4, L5 and L5-S1 junctions. Dr. Levin decided the claimant was then totally disabled, but that considerable improvement might be obtainable with surgery. This was the opinion also of Dr. John Leabhart who had examined the claimant in January 1973. The claimant, however, was reluctant to undergo surgery.

On August 13, 1973 Dr. Levin informed the claimant's counsel's firm by letter that if the recommended spinal fusion was successful the claimant might be able to return to his former employment with heavy lifting, or, more likely, to a fairly reasonable activity level. The doctor explained the surgery would be dangerous to his life, just as any anesthesia would be. It required blood transfusions and there would an element of risk; there is never any guarantee with any surgical procedure. The claimant had been seen in consultation by Dr. Bortnik and several other physicians, including a rheumatologist and other orthopedic surgeons, and the feeling was consistent that the claimant's was a local problem in the back without any sign of any never root irritation.

By January 8, 1974 Dr. Levin felt that the claimant's condition was essentially unchanged, although he could sleep at night and move around a little better. The doctor decided his only course was to have surgery, which he believed would be rather extensive, but not unusually risky. However, the doctor noted an additional risk factor in this case was that the claimant had asthma, some 3 to 4 attacks

a week, ". . . and this does present some problem in anesthesia and post-operative management, but they usually can be handled."

On March 27, 1974 Dr. Levin believed the claimant's condition had improved slightly and that he might be able to return to some kind of work. It would have to be sedentary and put minimum stress on his back, if he could be retrained for this. However, the doctor had little hope that he would be able to function in a work status.

By December 9, 1974 the claimant seemed worse with back pain, spasm, and episodes of sharp, disabling pain radiating down the left lower extremity. The claimant frequently had to hold on to walls, counters, chairs, etc. to protect himself. On standing, he listed to one side with marked lumbar muscle spasm and severe limitation of motion of the back with only a few degrees of flexion. He had some weakness of dorsiflexion of his left great toe, which could indicate a possible disc rupture. There continued to be marked lumbar muscle spasm and "excrutiating pain when directly stressing the lumbosacral junction." Dr. Levin decided the claimant was essentially totally disabled, as he could not even stand for any length of time withtout marked discomfort. The only way he could be returned to work status would be to perform surgery. Dr. Levin stated:

> "This [surgery] would be preceded with a myelogram and might require excision of the disc, but in any case would mean a lumbosacral fusion. Post-surgical recovery time is approximately six months. At maximum success Mr. Pettus would be left with at least a 25% permanent partial physical impairment to the entire body . . .
> . . . I feel Mr. Pettus is 100% disabled from any type of work at this point . . . I feel that his personal concerns as to surgery are honest and real

> and his present complaints are significantly disabling."

Obviously, there is substantial evidence indicating that the claimant has been both physically and economically disabled since his injury of May 10, 1972, except for the two weeks in July 1972 when he returned to work. "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Section 2(10) of the Act. Taking into consideration the claimant's age, education, employment history and the medical evidence of his physical condition, I find that the claimant's wage-earning capacity has been totally impaired as a result of his injury. No evidence was offered by the respondent to meet its burden of showing that other suitable work opportunities were available to the claimant. The claimant is entitled to temporary total disability in the amount of $70. per week, which was the maximum amount he could receive for his injury at that time, in view of his average weekly wage of $210. per week. Section 8(b) of the Act.

He is not entitled to compensation for permanent disability because he has not reached a point of maximum improvement. Total disability from a back injury is temporary since its prognosis or duration cannot be determined until an operation is performed and here there is a possibility that the claimant might undergo corrective surgery in the future or that his condition might improve. Sproles v. Baton Rouge Marine Contractors, Inc. 1 BRBS 4 (ALJ), 74-LHCA-275 (Jan. 6, 1975); Harris v. Olympus Terminal and Transport Co., 2 BRBS 234 (ALJ), 75-LHCA-283 (Sept. 5, 1975); Unger v. National Steel and Shipbuilding Co., 75-LHCA-239 (Apr. 6, 1976).

This brings up the final issue as to whether the claimant's refusal to undergo surgery was unreasonable or unjustified. Section 7(d) of the Act provides in part:

> "If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal."[1]

In my view, under the circumstances of this case, the claimant's refusal to submit to the surgery recommended by a physician was not unreasonable. The claimant had already submitted to a myelogram and x-rays. He has complied with his doctor's advice concerning exercises, showers, baths, rests and other treatments, except for the surgery. According to Dr. Levin, although the spinal fusion surgery would not be "*unusually* riskky," it would be extensive, it would be dangerous to life, as any other anesthesia would be, it would require blood transufsions, and there definitely would be an element of risk. Moreover, here there was an additional risk factor involving the claimant's asthma, some 3-4 attacks a week, which presented a "problem in anesthesia and post-operative management." Even if the surgery was successful the claimant could only expect a condition estimated as a 25 per cent permanent partial disability by the doctor. In addition to these actual risks, the claimant himself had additional reasons of his own for his refusal: his wife had died in a hospital from pneumonia unexpectedly; he was in fear of his own life and afraid that his two minor children would be left without any means of support. Also, he had been informed by other people who had received similar operations that their operations were not satisfactory. Dr. Levin

[1] A similar provision in the Workmen's Compensation Act of Virginia resulted in a suspension and termination of compensation payments to the claimant under the Virginia law.

believed that the claimant's fers were both honest and real. Accordingly, I find that the claimant's refusal to submit to surgery was neither unreasonable nor unjustified under the circumstances, and his compensation is not to be suspended or withheld for the refusal. Unger v. National Steel and Shipbuilding Co.; Sproles v. Baton Rouge Marine Contractors, Inc., both *supra;* Larson, Vol. 1 "The Law of Workmen's Compensation," #13.22 (1972 ed.).

A penalty of 10 percent is payable on all payments of compensation awarded herein which were not paid within 14 days after such became due, unless notice of controversion was filed within 14 days after the employer had knowledge of the injury, or the payment was excused by the Deputy Commissioner. Section 14(e) of the Act; Ryan v. McKie Co., 1 BRBS 221 (1974). In instances where payment was timely, but in an incorrect amount, the penalty is applied to the difference between the amount which was timely paid and the amount of compensation due on that date. Carmagna v. Campbell Machine, Inc., 1 BRBS 446 (1975). The calculation of the exact amount of the penalty to be added is remanded to the Deputy Commissioner for determination. Also, interest at the rate of 6 per cent per annum shall be added to the amount of compensation, plus the 10 per cent penalty which is found due herein, calculated from the date each payment was due until it is paid to the claimant. Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971).

The claimant is also entitled to reimbursement or payment by the respondent of the reasonable cost of such necessary medical care and treatment as the nature of the claimant's injury has required or may require.

The claimant's counsel has submitted an application for an attorney's fee of $1880. I find this amount to be reasonably commensurate with the actual necessary work performed and I hereby approve the fee requested.

This case having been remanded for determination in accordance with the Benefits Review Board decision, BRB Nos. 75-197 and 75-197A, and, for the reasons set forth above, such determination having been made, the following Order on Remand is made:

ORDER ON REMAND

1. The respondent shall pay to the claimant, pursuant to Section 8(b) of the Act, 33 USC 908(b), compensation for temporary total disability at the rate of $70. per week from May 11, 1972 to June 30, 1972 and from July 15, 1972 to the present and continuing during the existence of such disability, however, the respondent is to be credited with all compensation it has already paid to the claimant under the workmen's compensation laws of Virginia, due to his injury of May 10, 1972.[2]

2. The respondent shall pay a penalty of 10 per cent on all payments of compensation awarded herein which have not been paid when due. In those instances where payment was timely made, but in an incorrect amount, the penalty shall apply to the difference between the amount of the installment which was paid and the correct amount of compensation which was due.

3. The respondent shall pay interest on accrued unpaid benefits at the rate of 6 per cent per annum computed from the date each payment was originally due until paid.

4. The respondent shall pay for or reimburse the claimant for such reasonable medical services and supplies as the nature of his injury has required or may require.

[2]All computations herein are subject to verification by the Deputy Commissioner.

5. The respondent shall also pay directly to James A. Mannino, Esq. the sum of $1880. for legal services rendered on behalf of the claimant.

/s/ Robert S. Amery
ROBERT S. AMERY
Administrative Law Judge

Dated: May 12, 1976
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on May 19, 1976 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Washington, D.C. District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

George Pettus, 2551 Elvans Rd., S.E. #302, Washington, D.C. 20032
Claimant

American Airlines, National Airport, Washington, D.C.
Commercial Casualty Insurance Co., c/o Joseph Dyer, Esq., Suite 800, The Rosslyn Building, 1911 Ft. Myer Drive, Arlington, Va.

James A. Mannino, Esq., 925 - 15th Street, N.W., Washington, D.C. 20005

Joseph Dyer, Esq., Suite 800, The Rosslyn Building, 1911 Ft. Myer Drive, Arlington, Virginia

A copy was also mailed by regular mail to the following:

Judge Robert S. Amery, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

/s/ Jack Garrell
JACK GARRELL
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 1975